

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CHARLES WILSON)	
Claimant)	
VS.)	
)	Docket No. 231,010
PHILLYBOB'S, INC.)	
Respondent)	
AND)	
)	
WAUSAU UNDERWRITERS INSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant requested Appeals Board review of Administrative Law Judge Jon L. Frobish's April 8, 1998, preliminary hearing Order.

ISSUES

The Administrative Law Judge denied claimant's preliminary request for medical and temporary total disability compensation. The Administrative Law Judge found claimant failed to prove he was an employee of the respondent on the date of his accident. That is the single issue for Appeals Board review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board finds as follows:

Since it is necessary for an employment relationship to exist between the claimant and the respondent for the act to apply, then that issue is a jurisdictional issue which may be addressed on review by the Appeals Board. See K.S.A. 1997 Supp. 44-534a.

The respondent is a bar located in Wichita, Kansas. Claimant alleges on the date of his accident, January 17, 1998, he was employed as a bouncer by the respondent. Claimant testified he worked anywhere from four to six nights per week as a bouncer and he also performed other miscellaneous duties for the respondent such as filling ice bins, taking out trash, and changing light bulbs. Claimant testified he was paid \$40 cash per night plus respondent provided him with one to two free pitchers of beer per night. Claimant testified he took his instructions and orders from Bob Parker, the husband of respondent's owner, Phyllis L. Parker.

Claimant was injured on January 17, 1998, when he was run over by a customer driving a car in the respondent's parking lot. Claimant testified he was out in the parking lot breaking up a fight at the time he was hit by the car.

The accident occurred at the closing time of the bar at approximately 2:00 a.m. Claimant contends he has proven through his testimony, that at the time of the accident, he was employed by the respondent and, therefore, the accident arose out of and in the course of the employment relationship.

The respondent's owner, Phyllis L. Parker; manager Pam Ballinger; and night bartender Betty L. Meade all testified before the Administrative Law Judge at the preliminary hearing. All denied that claimant was employed by the respondent. Ms. Parker did admit claimant voluntarily changed a light bulb on one occasion but she denied claimant had performed any other duties for her. Claimant was a regular customer who came to the bar anywhere from four to six nights per week and drank beer until closing time. She testified claimant was always in the middle of arguments and fights because he liked that type of activity.

On the night of the accident, Ms. Parker testified her husband had requested claimant to help get his sister out of the bar because she was arguing with her boyfriend and was drunk and disorderly. Ms. Parker also testified she never paid claimant any money for any type of employment services and she had not given claimant any free beer.

The answer to the question of whether an employment relationship existed between the claimant and the respondent hinges on the credibility of the witnesses who testified in person before the Administrative Law Judge. The Administrative Law Judge had the opportunity to personally assess the demeanor of the witnesses and judge their credibility. The Administrative Law Judge denied claimant's request for medical and temporary total disability compensation. Therefore, the Administrative Law Judge had to find the claimant untruthful and the respondent's witnesses truthful. The Appeals Board finds some deference should be given to the Administrative Law Judge's conclusion because he was able to see the witnesses testify in person. The Appeals Board finds, giving some deference to the Administrative Law Judge, that claimant failed to prove an employment relationship existed between him and the respondent on the date of accident.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Administrative Law Judge's preliminary hearing Order dated April 8, 1998, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of May 1998.

BOARD MEMBER

c: Brian D. Pistotnik, Wichita, KS
Douglas C. Hobbs, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director